IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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MICHELE R. STEIGMAN, Petitioner-Plaintiff-Appellant,

v.

OUTRIGGER ENTERPRISES, INC., dba OHANA SURF HOTEL,
Respondent-Defendant-Appellee.

NO. SCWC-28473

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(ICA NO. 28473; CIV. NO. 05-1-0274)

December 15, 2011

CONCURRING OPINION BY ACOBA, J.

I concur in the outcome reached by the majority in this case, but for the reasons set forth herein. In my view, the known or obvious danger defense (1) is incompatible with Hawaiʻi's comparative negligence statute because it totally bars a plaintiff's recovery if the plaintiff is contributorily negligent, and (2) does not comport with the general duty of reasonable care owed by a landowner or occupier to those who enter the premises. Consequently, the known or obvious danger defense must be abrogated. Additionally, inasmuch as this case is remanded for a new trial, I would also hold that the circuit

court of the first circuit (the court) abused its discretion in allowing, via cross-examination of the plaintiff's experts, admission of multiple hearsay from records reviewed by the experts but not admitted in evidence.

I.

In her Application for Writ of Certiorari (Application), Petitioner/Plaintiff-Appellant Michele R. Steigman (Petitioner) argues that (1) the known or obvious danger defense "is inconsistent with Hawaii's comparative negligence standard and law regarding landowner liability" and (2) the defense should not be retained in the context of the duty owed by an owner or occupier of land to maintain his or her property.[1] [Id. at 6-8]

II.

As to Petitioner's first argument, our comparative negligence statute, HRS § 663-31 (1993), enacted in 1969, provides in relevant part as follows:

> **Contributory negligence no bar; comparative negligence; findings of fact and special verdicts.** (a) Contributory negligence shall not bar recovery in any action by any person or the person's legal representative to recover damages for negligence resulting in death or in injury to person or property, if such negligence was not greater than the negligence of the person or in the case of more than one person, the aggregate negligence of such persons against whom recovery is sought, but any damages allowed shall be diminished in proportion to the amount of negligence attributable to the person for whose injury, damage or death recovery is made.[2]

[1] The Application filed by Petitioner presents the following question: "Whether the jury in a negligence action should be specially instructed that [a] defendant is not liable for hazards on its property which are 'known and obvious,' and whether such instruction was warranted on the facts presented at trial herein."

[2] HRS § 663-31 continues as follows:

> (b) In any action to which subsection (a) of this section applies, the court, in a nonjury trial, shall make findings of fact or, in a jury trial, the jury shall return

(Emphases added.) Petitioner contends that the statute "allows 'one partly at fault in an accident resulting in injury to be recompensed for the damages attributable to the fault of another.'" (Quoting Wong v. Hawaiian Scenic Tours, Ltd., 64 Haw. 401, 405, 642 P.2d 930, 933 (1982).) According to Petitioner, the known or obvious danger doctrine is inconsistent with HRS § 663-31 because it serves "as a complete bar to recovery based on [the] contributory negligence [of the] plaintiff." (Citing Young v. Price, 47 Haw. 309, 318 n.11, 388 P.2d 203, 209 n.11 (1963).)

On the other hand, Respondent/Defendant-Appellee Outrigger Enterprises, Inc., dba Ohana Surf Hotel (Respondent), maintains that the doctrine is not inconsistent with HRS § 663-31 because the comparative negligence analysis applies "only after the defendant is found to have been negligent," while the known or obvious danger defense precludes a duty of care on the part of the defendant to the plaintiff, thereby barring any finding of a defendant's negligence. According to Respondent, "[w]here the defendant has not been found to be negligent, the comparative

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a special verdict which shall state:

(1) The amount of the damages which would have been recoverable if there had been no contributory negligence; and

(2) The degree of negligence of each party, expressed as a percentage.

(c) Upon the making of the findings of fact or the return of a special verdict, as is contemplated by subsection (b) above, the court shall reduce the amount of the award in proportion to the amount of negligence attributable to the person for whose injury, damage or death recovery is made; provided that if the said proportion is greater than the negligence of the person or in the case of more than one person, the aggregate negligence of such persons against whom recovery is sought, the court will enter a judgment for the defendant.

(d) The court shall instruct the jury regarding the law of comparative negligence where appropriate.

negligence analysis is moot," and, as a result, cannot conflict with the known or obvious danger defense.

The issue arose because in the instant case, the court gave the following instruction on the known or obvious danger defense, fashioned after Restatement (Second) of Torts (Restatement) § 343A (1965)[3] and comment b to the same section[4]:

> A hotel operator is not liable to its guests for physical harm caused to them by any activity or condition in the hotel whose danger is known or obvious to them, unless the hotel operator should anticipate the harm despite such knowledge or obviousness.
>
> The word "known" denotes not only knowledge of the existence of the condition or activity itself, but also appreciation of the danger it involves. Thus the condition or activity must not only be known to exist, but it must also be recognized that it is dangerous, and the probability and gravity of the threatened harm must be appreciated. "Obvious" means that both the condition and the risk are apparent to and would be recognized by a reasonable man, in the position of the guest, exercising ordinary perception, intelligence, and judgment.

(Emphasis added.)

A.

Prior to adopting a comparative negligence regime, the cases in our jurisdiction would seem to have viewed the known or

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[3] Restatement § 343A provides in relevant part:

> § 343A. Known Or Obvious Dangers. (1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.

[4] The second paragraph of the instruction is almost verbatim comment b to Restatement § 343A (1965).

Comment b to Restatement § 343A provides:

> The word "known" denotes not only knowledge of the existence of the condition or activity itself, but also appreciation of the danger it involves. Thus the condition or activity must not only be known to exist, but it must also be recognized that it is dangerous, and the probability and gravity of the threatened harm must be appreciated. "Obvious" means that both the condition and the risk are apparent to and would be recognized by a reasonable man, in the position of the visitor, exercising ordinary perception, intelligence, and judgment.

obvious danger defense as barring any recovery because of the plaintiff's contributory negligence. In Young, the plaintiff brought suit after she tripped and fell over a green hose placed across a sidewalk by the defendants. This court concluded that the plaintiff was contributorily negligent because "one who fails to see and avoid an obvious obstruction in or on sidewalk just ahead in plain sight is guilty of contributory negligence as a matter of law." 47 Haw. at 317, 388 P.2d at 208. Quoting comment b to Restatement § 474 (1965), this court stated:

> "[I]f the plaintiff would have observed the dangerous condition in time to avoid it, had he been paying that attention, which, in view of the normal risks of travel, a traveler should have paid, his contributory negligence in failing to exercise such reasonable vigilance is a bar to his recovery."

Id. at 318 n.11, 388 P.2d at 209 n.11 (emphasis added).

In Gelber v. Sheraton-Hawaii Corp., 49 Haw. 327, 327, 417 P.2d 638, 639 (1966), the plaintiff brought suit for damages in connection with injuries sustained after she tripped and fell as she was descending the steps in the main entrance of the defendant's (Sheraton) hotel. The plaintiff argued that the court's instruction on the known or obvious danger doctrine was "prejudicial" error because the instruction was not supported or warranted by the evidence adduced at trial.[5] Id. at 329-30, 417 P.2d at 640. Because there was nothing in the record to suggest that "the steps where the fall occurred constituted an obvious danger[,]" the Gelber court determined the instruction was

[5] The plaintiff objected to the portion of the instruction which stated, "And the owner is entitled to assume that the invitee will see and observe that which would be obvious through reasonably expected use of an ordinary person's senses. There is no duty to give the invitee notice of an obvious danger." Gelber, 49 Haw. at 329, 417 P.2d at 640 (emphasis added).

prejudicial because it "intimate[d] or suggest[ed] that the danger presented at [Sheraton's] premises might have been obvious and [the plaintiff] might therefore have been contributorily negligent." Id. at 330, 417 P.2d at 640 (internal quotation marks and citations omitted) (emphasis added).

However, our comparative negligence statute mandates that one's "[c]ontributory negligence shall not bar recovery in any action" so long such person's "negligence was not greater than the negligence of the person or in the case of more than one person, the aggregate negligence of such persons against whom recovery is sought[.]"[6] HRS § 663-31(a). Thus, unlike the known or obvious danger defense under which a plaintiff is completely barred from recovery if he or she was negligent, in any respect, in choosing to encounter the known or obvious danger, HRS § 663-31 bars recovery only if the negligence of the plaintiff was greater than that of the defendant.

B.

Although the statutory language of HRS § 663-31 is plain and unambiguous, we may resort to the legislative history to confirm this interpretation of the statute. See E & J Lounge Operating Co. v. Liquor Comm'n of City & County of Honolulu, 118 Hawaiʻi 320, 335, 189 P.3d 432, 447 (2008) ("Legislative history may be used to confirm interpretation of a statute's plain

[6] "It is well-established that, where a statute contains the word 'shall,' the provision generally will be construed as mandatory." Malahoff v. Saito, 111 Hawaiʻi 168, 191, 140 P.3d 401, 424 (2006) (citations omitted); see also Leslie v. Bd. of Appeals of County of Hawaii, 109 Hawaiʻi 384, 393-94, 126 P.3d 1071, 1080-81 (2006) ("Where a statute contains the word "shall," its provisions are generally to be construed as mandatory or imperative.").

language."); State v. Entrekin, 98 Hawaiʻi 221, 228, 47 P.3d 336, 343 (2002) ("Although we ground our holding in the statute's plain language, we nonetheless note that its legislative history confirms our view.") In enacting HRS § 663-31, the legislature noted that the rule of contributory negligence "bar[red] recovery by the injured party if it is shown that he, to any degree, contributed to his injuries." H. Stand. Comm. Rep. No. 397, in 1969 House Journal, at 778. HRS § 663-31 was enacted to "replace the common law doctrine of contributory negligence with a comparative negligence statute" because the legislature perceived the rule of contributory negligence "to be unfair and in opposition to the average person's concept of justice." Id. It was explained by the legislature that "[a] comparative negligence law would rectify this unfairness by providing that the court or jury compare the fault of the defendant with the fault of the plaintiff, if any, and scale down recovery in the amount of negligence attributable to the plaintiff"; "[o]nly if the evidence showed that the fault of the plaintiff was as great or greater than that of the defendant, would recovery be barred." Id. at 778-79.

Insofar as the known or obvious danger defense entirely precludes recovery because of the plaintiff's contributory negligence, it is incompatible with the comparative negligence statute. The defense does not provide a plaintiff with the opportunity to have "the court or jury compare the fault of the defendant with the fault of the plaintiff[.]" Id. Unlike our statute, the known or obvious danger defense "bars recovery by

the injured party if it is shown that he, to any degree, contributed to his injuries[,]" a result HRS § 663-31 was specifically designed to avoid. Id. at 778. Thus, the defense no longer remains viable in light of HRS § 663-31. Cf. Rapoza v. Parnell, 83 Hawaiʻi 78, 81-82, 924 P.2d 572, 575-76 (App. 1996).

In Rapoza, the ICA considered whether the "last clear chance" doctrine survived HRS § 663-31. See id. The Rapoza court explained that "[p]rior to the adoption of HRS § 663-31, all claims of negligence in Hawaiʻi were subject to the common law defense of contributory negligence[,]" which as stated, barred recovery to a plaintiff if it was shown that the plaintiff was negligent to any degree. Id. at 82, 924 P.2d at 576 (citing Armstrong v. Cione, 6 Haw. App. 652, 657, 736 P.2d 440, 444 (1987) (citing Pacheco v. Hilo Elec. Light Co., 55 Haw. 375, 520 P.2d 62 (1974))). "An exception to the defense of contributory negligence was the common law doctrine of last clear chance--a doctrine judicially created to mitigate the harsh results of contributory negligence." Id. (citing Prosser, Law of Torts § 65, at 438 (3d ed. 1964) [hereinafter, Prosser, Torts]. Under that doctrine, even if the plaintiff was negligent, his or her negligence would not defeat recovery if it could be shown that the defendant had the last clear chance to avoid the injury to the plaintiff. See id.

Rapoza acknowledged that "[n]othing in the language or legislative history of HRS § 663-31 explicitly abolishe[d] the last clear chance doctrine." Id. However, the ICA observed that the doctrine had "been severely criticized for being harsh as

well as archaic in light of modern ideas of proximate causation[]" because if it applied in a particular case, "the entire burden [wa]s shifted back onto the defendant who must then pay the full amount of the plaintiff's damages despite the fact that the plaintiff was negligent." Id. at 83, 924 P.2d at 577. The ICA noted that, in contrast, "HRS § 663-31 allows for an apportionment of damages provided that the plaintiff's negligence is not greater than the defendant or defendants." Id. Rapoza concluded that the last clear chance doctrine was no longer viable because "the purpose of the last clear chance doctrine is to mitigate the harsh results of contributory negligence," but the doctrine of contributory negligence had been abolished in Hawaiʻi. Id. Accordingly, it was determined that HRS § 663-31 rendered the last clear chance doctrine obsolete, and, thus, the doctrine was judicially abolished. Id.

Similar to Rapoza, because the contributory negligence doctrine has been abolished, the known or obvious danger doctrine, a variant of contributory negligence, is no longer viable. Under HRS § 663-31, a plaintiff is not completely barred from recovery simply because he or she is negligent. Accordingly, as with the last chance doctrine, HRS § 663-31 has rendered the known or obvious danger defense obsolete and it must therefore be abrogated. The court's instruction on this defense, then, constituted reversible error.

III.

A.

In connection with her second argument, Petitioner

contends that the known or obvious danger defense should not be retained with respect to the duty owed by an owner or occupier of land to those who enter the premises. According to Petitioner, although one may not have a duty to warn of known or obvious dangers under the doctrine, the fact that a danger is known or obvious should not obviate the obligation of a landowner or occupier of land to rectify or correct such dangers. Respondent suggests, however, that the doctrine should be retained because it specifically concerns the existence of a defendant's duty of care, which must be established as part of a plaintiff's prima facie case before any comparative negligence analysis can be performed.

While, as noted, some cases in this jurisdiction have discussed the defense in terms of barring a plaintiff's recovery on account of the plaintiff's contributory negligence, the defense has also been applied in terms of the duty owed by an owner or occupier of land to those who enter the premises. With respect to landowners' or occupiers' duty, in Pickard v. City & County of Honolulu, 51 Haw. 134, 135, 452 P.2d 445, 446 (1969), this court abolished the common law distinctions between classes of persons (licensee/invitee) with regard to the duty owed by an owner or occupier of land to those who enter the premises. This court stated, "We believe that the common law distinctions between classes of persons have no logical relationship to the exercise of reasonable care for the safety of others." Id. According to Pickard, "'[a] man's life or limb does not become less worthy of protection by the law nor a loss less worthy of

compensation under the law because he has come upon the land of another without permission or with permission but without a business purpose'" and "'[r]easonable people do not ordinarily vary their conduct depending upon such matters[.]'" Id. at 136, 452 P.2d at 446 (quoting Rowland v. Christian, 443 P.2d 561, 568 (Ca. 1968)).

Thus, in the view of the Pickard court, "'[t]o focus upon the status of the injured party as a trespasser, licensee, or invitee in order to determine the question whether the landowner has a duty of care, is contrary to our modern social mores and humanitarian values.'" Id. (quoting Rowland, 443 P.2d at 568). In accordance with the foregoing, this court held that "an occupier of land has a duty to use reasonable care for the safety of all persons reasonably anticipated to be upon the premises, regardless of the legal status of the individual." Id. at 135, 452 P.2d at 446 (emphasis added).

Then, in Friedrich v. Dep't of Transp., 60 Haw. 32, 33, 586 P.2d 1037, 1038 (1978), superceded in non-relevant part by statute,[7] Pickard was seemingly qualified. In that case, the

[7] In Friedrich, this court stated:

> Where the government maintains land upon which the public are invited and entitled to enter, it "may reasonably assume that members of the public will not be harmed by known or obvious dangers which are not extreme, and which any reasonable person exercising ordinary attention, perception, and intelligence could be expected to avoid."

60 Haw. at 36-37, 586 P.2d at 1040 (quoting comment g to Restatement § 343A) (emphasis added). In Bhakta v. County of Maui, 109 Hawaiʻi 198, 214-15, 124 P.3d 943, 959-60 (2005), it was explained that Act 190, enacted in 1996, provides that where the State or county operates a public beach park, it "'shall have a duty to warn the public specifically of dangerous shorebreak or strong current in the ocean adjacent to a public beach park if these conditions are extremely dangerous, typical for the specific beach, and if they pose a risk of serious injury or death.'" (Quoting 1996 Haw. Sess. L.

plaintiff brought suit to recover for injuries, leaving him paralyzed from the neck down, sustained when he fell into shallow water from a State-owned pier in Hanalei, Kauai. Id. at 33, 586 P.2d at 1038. At the time of the accident, the pier was in a deteriorated condition. Id. at 33, 586 P.2d at 1038-39. The Plaintiff was wearing slippers. He testified at trial that he slipped off the pier while attempting to avoid stepping into puddles, acknowledging that it would have been slippery and dangerous to walk through the puddles. Id. at 34, 586 P.2d at 1039.

The trial court first rendered a finding that the danger of slipping off the pier was a danger that "was in fact obvious to [the plaintiff], and that he was fully aware, when he chose his path, both of the conditions which created the risk of his accident and of the risk that he might slip and fall if he stepped into the puddle." Id. at 35-36, 586 P.2d at 1040. The trial court concluded that the plaintiff's negligence was equal to or, in excess of, the State's negligence.

Act 190, § 2(a), at 435.) (Emphasis added.) According to Bhakta, "[u]nder the plain language of section 2(a) [of Act 190], the State is required to warn of 'extremely dangerous' ocean conditions (1) that occur at public beach parks, (2) if these conditions are typical for the specific beach, and (3) if they present a risk of serious injury or death." Id. (emphasis omitted). Bhakta noted that "in promulgating Act 190, the legislature expressly provided that the State and counties are not subject to any other duty to warn of dangerous natural ocean conditions, 'other than as provided in [Act 190.]'" Id. (brackets in original) (quoting 1996 Haw. Sess. L. Act 190, § 2(f) at 435) (emphasis omitted). Therefore, this court found the plaintiffs' argument "that the State has a common law duty to warn of 'extremely dangerous' ocean conditions" to be "without merit." and held that "[t]o the extent that *Friedrich* . . . may be read as conflicting with the legislature's decision to limit the State and counties' duty to warn of 'extremely dangerous conditions' at only public beach parks . . . *Friedrich* . . . [is] superseded by Act 190." Id. (emphasis added). Such "extremely dangerous conditions" are not relevant to the facts of this case. Accordingly, Friedrich is authority that is contrary to Petitioner's position.

This court, however, viewed the outcome in terms of the duty owed by the State. It was posited that the duty of care owed by an owner or occupier of land to all persons reasonably anticipated to be upon the premises neither "require[s] the elimination of known or obvious hazards which [one] would reasonably be expected to avoid[,]" id. at 36, 586 P.2d at 1040 (citing Restatement (Second) of Torts § 343A (1965)) (emphasis added),[8] or a duty to warn of such dangers, except for certain specific circumstances,[9] id. at 36-37, 586 P.2d at 1040. Because the danger of slipping off the pier was obvious, this court concluded that the State did not breach its duty of care toward the plaintiff. Id. at 37, 586 P.2d at 1041; see also Harris v. State, 1 Haw. App. 554, 557, 623 P.2d 446, 448 (1981) (noting that this court "has held that in a negligence action against the State, the duty of care which the State, as an occupier of the premises[,] owed to the appellant does not require the elimination of known or obvious hazards which are not extremes and which appellant would reasonably be expected to avoid") (citing Freidrich, 60 Haw. at 32, 586 P.2d at 1037).

[8] The comment to Restatement § 343A suggests, to a certain extent, that the defense does concern the duty of a landowner or occupier: Because "[t]he possessor of land may reasonably assume [that one who enters] will protect himself by the exercise of ordinary care, or that he will voluntarily assume the risk of harm if he does not succeed in doing so[,]" "[r]easonable care on the part of the possessor . . . does not ordinarily require precautions, or even warning, against dangers which are known to the visitor, or so obvious to him that he may be expected to discover them." Comment e to Restatement § 343A (emphasis added).

[9] Friedrich distinguished Levy v. Kimball, 50 Haw. 497, 443 P.2d 142 (1968). In Levy, unlike in Friedrich, the State was held to "a duty to maintain" a seawall "used as a public thoroughfare[.]" Id. at 499, 443 P.2d at 144. This court indicated the duty fell within the exception that "the obvious dangers could not be readily avoided" by the plaintiff. Friedrich, 60 Haw. at 37, 586 P.2d at 1040.

One might argue that the known or obvious danger doctrine does not conflict with our comparative negligence statute because HRS § 663-31 is implicated only if both the plaintiff and defendant are negligent, and if the owner or occupier of land has no duty to warn of, or eliminate, known or obvious dangers, the owner or occupier cannot be deemed negligent. The ICA in fact rested its conclusion that the defense was not in conflict with HRS § 663-31 on the ground that "[t]he known or obvious [danger] doctrine is determinative of the threshold issue of defendant's negligence, and more specifically, whether the defendant possessor of land owes a legal duty to the injured party." Steigman v. Outrigger Enters., Inc., No. 28473, 2010 WL 4621838, at *3 (App. Nov. 16, 2010) (SDO) (citing Harris, 1 Haw. App. at 557, 623 P.2d at 448).[10] According to the ICA, "if the finder of fact determines that the hazard falls within the known or obvious [danger] doctrine, the question of comparative negligence is never reached as the defendant owes no duty to the plaintiff, and accordingly, cannot be negligent as a matter of law." Id. In other words, "[i]n the absence of a legal duty owed to the plaintiff, there is no negligence to compare under HRS § 663-31." Id.

B.

However, assuming arguendo, that the known or obvious danger doctrine in defining the duty owed by the landowner does

[10] Harris states the general proposition that there is no duty to eliminate known or obvious dangers, but does not use this principle in reaching its conclusion that the defendant did not have actual or constructive notice of the conditions that allegedly caused the plaintiff's injuries. 1 Haw. App. at 557-58, 623 P.2d at 448-49.

not conflict with HRS § 663-61, this court may consider the continuing vitality of Friedrich. Rodrigues v. State, 52 Haw. 156, 170, 472 P.2d 509, 518-19 (1970); accord Blair v. Ing, 95 Hawaiʻi 247, 259, 21 P.3d 452, 464 (2001). "Duty . . . is a legal conclusion which depends upon 'the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.'" Rodrigues, 52 Haw. at 170, 472 P.2d at 518 (quoting Prosser, Torts § 53 at 332); accord Pulawa v. GTE Hawaiian Tel., 112 Hawaiʻi 3, 12, 143 P.3d 1205, 1214 (2006); McKenzie v. Hawaiʻi Permanente Med. Group, Inc., 98 Hawaiʻi 296, 301, 47 P.3d 1209, 1214 (2002); Blair, 95 Hawaiʻi at 259, 21 P.3d at 464; Lee v. Corregedore, 83 Hawaiʻi 154, 166, 925 P.2d 324, 336 (1996); Johnston v. KFC Nat. Mgmt. Co., 71 Haw. 229, 232, 788 P.2d 159, 161 (1990); Cootey v. Sun Inv., Inc., 68 Haw. 480, 484, 718 P.2d 1086, 1090 (1986); Hayes v. Nagata, 68 Haw. 662, 667, 730 P.2d 914, 917 (1986); First Ins. Co. of Hawaii, Ltd. v. Int'l Harvester Co., 66 Haw. 185, 189, 659 P.2d 64, 67 (1983); Waugh v. Univ. of Hawaii, 63 Haw. 117, 135, 621 P.2d 957, 970 (1980); Kelley v. Kokua Sales & Supply, Ltd., 56 Haw. 204, 207, 532 P.2d 673, 675 (1975). In this case, policy considerations would weigh in favor of recognizing that the duty of reasonable care owed by landowners and occupiers applies to circumstances traditionally giving rise to a known or obvious danger defense. Thus, Friedrich should be overruled insofar as it held that a landowner or occupier owes no duty of care, with respect to known or obvious dangers, to those reasonably anticipated to enter one's premises, no matter the circumstances.

First, Friedrich would appear to have departed from the governing reasonable care standard set forth in Pickard. Pickard sought to eliminate distinctions with respect to owner or occupier duty, making clear that there is only one standard of care owed by an owner or occupier of land: "reasonable care for the safety of all persons reasonably anticipated to be upon the premises[.]" Pickard, 51 Haw. at 135, 452 P.2d at 446. The duty formulated in Pickard rested on policy considerations eschewing outdated legal classifications, affirming the value of life and limb, and crediting ordinary conduct and expectations. In light of that duty, "there is no fixed standard of the requirement of reasonable or ordinary care. Its measure is not accurately defined by statute or decision. Manifestly the requirements are not, and cannot be the same under all circumstances, and in all places." Kellett v. City & County of Honolulu, 35 Haw. 447, 453 (Haw. Terr. 1940) (internal quotation marks and citation omitted). "What is such care, therefore, in a given case is necessarily dependent on the particular facts developed in the judicial investigation." Id. (internal quotation marks omitted).

There is authority that concedes a known or obvious condition should not completely absolve a landowner or occupier from its duty to take reasonable care. Rather, the nature of a particular condition is a factor to be considered in deciding whether the defendant failed to take the care that was reasonable under the circumstances. For example, as explained in comment e to Restatement § 343A, "[r]easonable care on the part of the possessor [] does not ordinarily require precautions, or even

warning, against dangers which are known to the visitor, or so obvious to him that he may be expected to discover them." However, there are "cases in which the possessor of land can and should anticipate that the dangerous condition will cause physical harm to the invitee notwithstanding its known or obvious danger." Restatement § 343A cmt f. According to the comment, in those cases, "the possessor is not relieved of the duty of reasonable care which he owes to the invitee for his protection." Rather, the duty of reasonable care "may require him to warn the invitee, or to take other reasonable steps to protect him, against the known or obvious condition or activity," if, for example, "the possessor has reason to expect that the invitee will nevertheless suffer physical harm." Id.

In a similar vein, it has been explained that, "in the usual case, there is no obligation to protect the invitee against dangers which are known to him, or which are so obvious and apparent that he may reasonably be expected to discover them" and protect himself against such danger. W. Keeton, et al., Prosser & Keeton on Torts § 61, at 427 (5th ed. 1984) (footnotes omitted). However, "this is certainly not a fixed rule, and all of the circumstances must be taken into account." Id. For example, "where the occupier as a reasonable person should anticipate an unreasonable risk of harm to the invitee notwithstanding his knowledge . . . or the obvious nature of the condition, something more in the way of precautions may be required." Id. (footnote omitted).

To perpetuate specific exceptions to the known or obvious danger doctrine, see Friedrich, 60 Haw. at 36, 586 P.2d at 1040, seems contrary to the governing reasonable care standard set forth in Pickard and the policy considerations supporting that case. In the Pickard framework, whether a danger is known or obvious should be viewed as a factor, along with other circumstances, in determining whether the landowner or occupier breached its "duty of reasonable care for the safety of all persons reasonably anticipated to be upon the premises[,]" rather than as a rule excusing the exercise of any care. 51 Haw. at 135, 452 P.2d at 446. This would be consonant with the truism that what is due "care . . . in a given case is . . . dependent on the particular facts." Kellett, 35 Haw. at 453.

Bidar v. Amfac Inc., 66 Haw. 547, 669 P.2d 154 (1983), decided after Friedrich, further supports this approach. In Bidar, the plaintiff brought an action against a hotel owner and operator for injuries incurred when she grabbed a towel bar affixed to the wall as she attempted to pull herself up from the toilet. Id. at 549, 669 P.2d at 157. This court considered whether the trial court properly granted summary judgment as to the plaintiff's negligence claim. Id. at 547-49, 669 P.2d at 157.

In the opinion of the dissent in Bidar, summary judgment was appropriate because pursuant to Friedrich, the duty of care owed by an occupier of premises to those who enter the premises "'traditionally does not require the elimination of known or obvious hazards which [the] appellant would reasonably

be expected to avoid.'" Id. at 559, 669 P.2d at 162 (Circuit Judge Spencer assigned by reason of vacancy, dissenting) (quoting Friedrich, 60 Haw. at 36, 586 P.2d at 1040). According to the dissent, "the defendant . . . was perfectly reasonable in assuming that the plaintiff would know better than to use a towel rack as if it was designed and intended to support the weight of a person" and, therefore, could not "be said to have breached a duty of reasonable care owed to [the] plaintiff merely by maintaining a towel rack, on a wall next to the toilet, which could not support the weight of a person." Id. at 560, 669 P.2d at 163.

A majority of this court, however, did not adopt such an approach and reinforced the principle that "'[a]n occupier of land . . . has a duty to use reasonable care for the safety of all persons reasonably anticipated to be upon the premises.'" Id. at 552, 669 P.2d at 159 (quoting Pickard, 51 Haw. at 135, 452 P.2d at 446). Bidar declared that "there unquestionably is a duty owed by the hotel operator to maintain a bathroom adjoining a hotel room in a reasonably safe condition for the use of the guest." Id. Thus, according to Bidar, "[w]hether it was foreseeable that a guest would grab a towel bar within easy reach for support in rising from a toilet seat is in our view a genuine issue of material fact that ought to be left for jury consideration." Id. at 554, 669 P.2d at 160. It was ultimately held by this court that the trial court erred in summarily disposing of the plaintiff's negligence claim. Id.

As elucidated by the foregoing discussion, the duty owed by a landowner or occupier to those who enter his, her, or its premises should be that of reasonable care, as defined by the circumstances.[11] The rule set forth in Friedrich absolving a landowner or occupier of a duty of care as to known or obvious dangers does not comport with the reasonable care standard. Therefore, Friedrich must be overruled.

C.

As noted supra, while it may be argued that the known or obvious danger defense does not conflict with the face of HRS § 663-31 insofar as it relates to the duty of a landowner or occupier, even in the duty context, the defense runs afoul of the policies embodied by HRS § 663-31 and the legislative intent thereof. Whether the defense is couched in terms of a plaintiff's contributory negligence or landowner or occupier duty, the distinction is not material under the mandate of HRS

[11] Other courts have considered additional policy reasons for abolishing the doctrine in the context of landowner or occupier duty. For example, Petitioner points to O'Donnell v. City of Casper, 696 P.2d 1278, 1283 (Wyo. 1985), in which the Supreme Court of Wyoming stated, "A rule of law which provides that one who creates a known and obvious danger has no duty to correct it because it is known and obvious is not rational." It was stated:

> Such a rule would not discourage a city from creating or allowing the continued existence of a great and obvious danger. It is not logical to hold that if the city digs an immense hole in the road that can be seen a block away, that its duty to keep the roads safe vanishes. On the other hand, if the city digs a small hole not easy to see, its duty remains. In other words, the bigger the hole the lesser the duty.

Id.

The Supreme Court of Texas, in overruling the doctrine, reasoned in part that (1) the "no-duty" rule has "contributed confusion" and (2) "[t]he no-duty rule imports a plaintiff's subjective knowledge of a condition into an objective general duty rule[,]" which "runs counter to the traditional resolution of liability that is determined by objective standards of negligence." Parker v. Highland Park, Inc., 565 S.W.2d 512, 518-19 (Tex. 1978).

§ 663-31. With respect to contributory negligence, a plaintiff is barred from recovery if the defense applies because he or she was contributorily negligent in choosing to encounter a particular danger, notwithstanding his or her appreciation of the risks involved. As the doctrine operates with respect to duty, a landowner or occupier owes no duty to remedy or warn of known or obvious dangers, because a landowner can reasonably assume that if one who enters the subject premises is injured by such danger, that person would either be negligent in failing to notice and appreciate the risk, or would have voluntarily assumed the risk of harm. In that regard, the known or obvious danger defense, in terms of duty, cannot be readily distinguished from the basis for imputing negligence to the plaintiff. Whether the defense is said to go to a plaintiff's contributory negligence or to landowner or occupier duty, the fact that a danger is deemed known or obvious serves as a complete bar to a plaintiff's recovery; a proposition the legislature rejected by enacting HRS § 663-61. See supra. Accordingly, the known or obvious danger doctrine should not be retained in the context of landowner or occupier duty.

IV.

The majority concludes that the known and obvious danger doctrine should not be retained in the context of duty, in part, based on its conclusion that the doctrine is "fact-intensive" and that "such assessment should be reserved for the jury[.]" Majority opinion at 32. However, here, it is not the dichotomy between the judicial function and the jury function (or

the law and the fact-finding functions) that dictates abrogation of the known and obvious danger doctrine. See id. Rather, as stated supra, the known and obvious danger doctrine is tied to contributory negligence, see Gelber, 49 Haw. at 327, 417 P.2d at 639 and Young, 47 Haw. at 317, 388 P.2d at 208, which has been abolished in this state. Following the rationale of Hawaiʻi precedent, the known and obvious danger doctrine must be abolished as well. See e.g., Rapoza, 83 Hawaiʻi at 81-83, 924 P.2d at 575-77. In other words, as Hawaiʻi cases have developed, the sum total of policy considerations leads the law to say that plaintiffs are entitled to a comparison of fault even in what would be traditional known or obvious danger contexts. Rodrigues, 52 Haw. at 170, 472 P.2d at 518 (explaining that duty is a legal conclusion depending upon the sum total of policy considerations that lead the law to say that the particular plaintiff is entitled to protection). Thus, respectfully, it is the standard of duty owed that defines the role of the judge and the jury rather than, as the majority posits, the supposed "fact-intensive" nature surrounding known and obvious danger situations. Majority opinion at 31, 32.

Consequently, the duty that displaces the doctrine that there is no duty in known and obvious danger situations, is that of "reasonable care [owed by the landowner or occupier] for the safety of all persons reasonably anticipated to be upon the premises, regardless of the legal status of the individual."

Pickard, 51 Haw. at 135, 452 P.2d at 446.[12] The facts and circumstances surrounding what may have been viewed historically as a known and obvious condition are germane because they shape the contours of care required under the test expressly set forth in Pickard; not because such conditions may be "fact-intensive." Majority opinion at 31, 32.

V.

On appeal to the ICA, Petitioner raised a question as to whether it is permissible on cross-examination for an expert to read into the record hearsay statements derived from an employment record not introduced into evidence but reviewed by experts in the course of forming their opinions. The court allowed such hearsay to be read over Petitioner's objection. Respectfully, in my view the ICA incorrectly affirmed the court.

Inasmuch as this case is remanded for a new trial, it is incumbent upon this court to decide this question. I must disagree with the majority that the issue is "no longer relevant to this appeal[,]" majority opinion at 6, although not expressly

[12] It may be noted, that Restatement § 343A refers to the concept of foreseeability, in terms of whether or not harm to a person entering one's property should have been foreseeable to the landowner or occupier in spite of the known or obvious nature of the danger. Foreseeability is not relevant to the issue presented in this case--whether the known and obvious danger doctrine should be abolished. Because the standard of care that applies is "reasonable care for the safety of all persons reasonably anticipated to be upon the premises[,]" Pickard, 51 Haw. at 135, 452 P.2d at 446 (emphasis added), foreseeability is already accounted for in the Pickard test. See Pulawa v. GTE Hawaiian Tel, 112 Hawaiʻi 3, 13, 143 P.3d 1205, 1215 (2006) (explaining that "[t]he risk reasonably to be perceived defines the duty to be obeyed; it is the risk reasonably within the range of apprehension, of injury to another person, that is taken into account in determining the existence of the duty to exercise care") (internal quotation marks and citation omitted).

raised in Petitioner's Application.[13] If the issue is not addressed by this court, the case will be remanded and retried on erroneous evidentiary grounds since the ICA decision on this question remains in effect. This court has provided guidance to courts regarding erroneous evidentiary rulings and other matters in similar circumstances. See e.g., State v. Wakisaka, 102 Hawaiʻi 504, 507, 518, 78 P.3d 317, 320, 331 (2003) (although not dispositive, stating that the circuit court erroneously excluded testimony "in order to provide some guidance to the circuit court on retrial") and State v. Culkin, 97 Hawaiʻi 206, 211, 35 P.3d 233, 238 (2001) ("provid[ing] guidance on remand" and holding that, "the circuit court abused its discretion by permitting the prosecution to cross-examine [the defendant] about multiple false identification cards discovered at his house with foreknowledge that [the defendant] intended to invoke his fifth amendment privilege if questioned about them"); see also State v. Nichols, 111 Hawaiʻi 327, 340-341, 141 P.3d 974, 987-88 (2006) ("provid[ing] guidance to the circuit court on remand" regarding jury instructions); KNG Corp. v. Kim, 107 Hawaiʻi 73, 74-75, 110 P.3d 397, 398-99 (2005) ("Because we remand the case, we conclude, for guidance of the court, that [the statute] does not violate the due process and equal protection clauses of the state and federal constitutions."); Gap v. Puna Geothermal Venture, 106

[13] The issue was raised, preserved and addressed by the courts below and was also discussed during this court's oral argument. See OA 5/5/11 at 24:00-21, available at http://www.courts.state.hi.us/courts/oral_arguments/recordings_archive.html.

Hawaiʻi 325, 331, 104 P.3d 912, 918 (2004) ("offer[ing] guidance to the circuit court in setting an appropriate sanction on remand"); State v. Aganon, 97 Hawai'i 299, 303, 36 P.3d 1269, 1273 (2001) ("examin[ing the defendant's' remaining arguments on appeal" regarding the propriety of jury instructions given "[i]n order to provide guidance to the circuit court on remand").

Moreover, the question should be decided for purposes of judicial economy. If the court's evidentiary ruling is challenged again on appeal following remand, it would seem apparent that this court would need to consider the issue anew. See Commonwealth v. Moose, 602 A.2d 1265, 1276 n.11 (Pa. 1992) (stating that, although not dispositive, because "we have reversed this case and remanded it for a new trial[,]" "principles of judicial economy encouraged us to reach the issue of whether [the defendant's] Sixth Amendment rights were violated" because we may "possibly be faced with it again, should [the same conduct occur during] retrial"); see also Loup-Miller v. Brauer & Assocs.-Rocky Mountain, Inc., 572 P.2d 845, 847 (Colo. Ct. App. 1977) (although an issue was not properly raised "in [the] plaintiffs' motion for a new trial[,]" the appellate court addressed the issue on the merits, "[s]ince the case must be retried, and the problem will arise again[.]"); see also Ryan v. Hazel Park, 279 Fed. Appx. 335, 339, No. 07-1659, 2008 WL 2130370, at *4 (6th Cir. 2008) (noting that "where the trial court addressed the issue and both parties briefed the issue, judicial economy requires" the court to address it, "rather than

forcing the parties to raise it with the district court anew on remand"). Finally, if the ICA's erroneous ruling allowing for inadmissible information to be elicited from an expert during cross examination is not remedied, trial courts may rely on the ICA opinion for guidance, despite its wrong application of the Hawaiʻi Rules of Evidence (HRE). See Hawaiʻi Rules of Appellate Procedure (HRAP) Rule 35(c) (stating that "unpublished dispositional orders are not precedent, but may be cited for persuasive value").

VI.

A.

During trial, on November 1, 2006, Petitioner's expert witness, Dr. Michael Ferrante (Ferrante), a physician specializing in pain medicine, was asked on cross examination whether Petitioner's termination for timecard fraud would affect his opinion about her credibility:

> [RESPONDENT'S COUNSEL]: Make any difference to you why [Petitioner] was fired from her job?
> [FERRANTE]: No.
> [RESPONDENT'S COUNSEL]: If she was fired from her job--
> [PETITIONER'S COUNSEL]: Objection, Your Honor.
> THE COURT: Overruled.
> [RESPONDENT'S COUNSEL]: --for time[]card--
> [PETITIONER'S COUNSEL]: Objection, Your Honor.
> THE COURT: Overruled.
> [RESPONDENT'S COUNSEL]: If she was fired from her job for time[]card fraud in reporting hours that she did not work for certain weeks in September of 2005, would that indicate to you that there was a problem with her credibility?
> [PETITIONER'S COUNSEL]: Objection, your Honor.
> THE COURT: Overruled.
> [FERRANTE]: Not necessarily. . . .

On November 2, 2006, Petitioner's counsel "put on the record" his "continuing objections" to any questions "dealing with" "time[]card fraud, excessive phone use, and

insubordination."[14] He sought to strike the questions and respective answers elicited from Ferrante, and argued that employment records containing the reasons for termination could only be admitted "through a live witness with personal knowledge" of the information contained in the employment records. The court directed Respondent to "[a]void using the language that's on those [employment] documents until you get the documents into evidence."

On November 3, 2006, the direct examination was conducted of Stanley Owings (Owings), an expert "in the field of vocational rehabilitation[.]" Owings was retained by Petitioner on May 8, 2006, for the purpose of formulating a "vocational rehabilitation plan" for Petitioner. In his May 26, 2006 report, Owings explained that Petitioner had been in the workforce for about 26 years, and was injured in May 2005. Pursuant to his interview or "discussion with [Petitioner]," he understood that, in September 2005, during her employment as a traffic control supervisor, "she had a disagreement with someone," and "basically was fired." However, Owings explained that Petitioner told him she had attempted to find another job, but could not find one that was "physically appropriate[.]" Owings determined that "sedentary employment" was "critical" for Petitioner and he

[14] One employment document, Exhibit 204, stating that Petitioner had engaged in over billing, excessively used the phone, was insubordinate, and had poor performance, with the result of termination, was not admitted into evidence, but was admitted for identification. However, Exhibit 204-A, stating that Petitioner had received a warning on April 4, 2005 because she was "not happy to work," was admitted during the cross examination of Petitioner on November 9, 2006.

advised her to either pursue a bachelor's degree program, or attend a community college.

B.

On November 3, 2006, during cross examination of Owings, Respondent's counsel asked him to explain a document entitled "[Petitioner's] file chronology," (chronology) that was attached to his report. He was then asked to "read" the "first entry" of the chronology, to which Petitioner's counsel objected; however, the court allowed the entry into evidence. Owings read the following:

> [OWINGS]: I'll start from the 9/23/95, . . . the date of the records, the miscellaneous employment records.
>
> [At Petitioner's former company, Petitioner's] pay rate is [$]19.25. She is a flagger. [Petitioner] was discharged for timecard fraud, reporting hours that she did not work, insubordination, not following directions given by supervisor, violation of company rules, safety concerns, over use of phone.
>
> Employer believes [Petitioner's] actions were deliberate and have caused potential harm to the business.
>
> [PETITIONER'S COUNSEL]: I'm going to object, again. Move to strike that, again, as hearsay[.]
>
> THE COURT: We'll take it up later. Continue.

(Emphases added.)

That day, after the jury was excused, Petitioner's counsel stated that there was a "continuing objection" to the mention of the entry, and asked Respondent's counsel to "state for the record the names" of the company witnesses "he expects to call for purposes of admitting those records into evidence, and to overcome the hearsay objections[.]" Respondent's counsel responded that he intended to call the employees, who would "identify these . . . documents as being part of [the company's] records." The court explained that it would "wait and see what

the disclosure is." Notably, on November 8, 2006, after other witnesses had testified, the court stated:

> It seems to me that both sides have been trying to get in a lot of hearsay information through the experts' reports. . . . [Respondent is] trying to get in hearsay statements from the employer through the expert[15]. . . . Reading from an exhibit is not permitted unless and until the exhibit is admitted into evidence. . . . And, quite frankly, I didn't catch it . . . the first time you did it and unfortunately I had allowed that piece to come in. I think that was with one of the -- maybe with [] Owings.

(Emphasis added.)

As indicated, at numerous points throughout trial, Respondent referred to the fact that Petitioner was terminated from her job for "time[]card fraud." Additionally, Respondent asked Petitioner's economist, Thomas Loudat, if Petitioner was terminated for timecard fraud, to which Petitioner again objected. Finally, in closing argument, Respondent quoted from Owings' testimony, stating that Petitioner "[w]as discharged for time[]card fraud, reporting hours that she did not work; insubordination, not following directions given by supervisor; violation of company rules; safety concerns over use of phone[.]"

Respondent failed to call any witnesses with respect to the hearsay statements.

VII.

On appeal, Petitioner argued, inter alia, that the court abused its discretion in "allowing inadmissible hearsay" that Petitioner was fired for "'time[]card fraud', 'insubordination' and the like[,]" read "into the record[.]" According to Petitioner, the court erred in, among other things,

[15] The court was referring to Petitioner's expert witness Thomas Loudat, who holds a doctorate in economics, and who testified that day.

(1) allowing inadmissible hearsay to be read into the record, in violation of HRE Rule 805 (1993),[16] (2) permitting the inference that Petitioner was acting in conformity with her prior conduct that was derived from the employment entry, in violation of HRE Rule 404(b) (Supp. 2006),[17] and (3) failing to exclude the evidence about the reasons for Petitioner's termination pursuant to HRE Rule 403 (1993).[18] Petitioner maintained that because the entry was based upon "statements of other nonparties which were not attached to or included in the documents which [were] . . . improperly read to the jury[,]" the statements were hearsay and should have been excluded.

In its answering brief, Respondent did not respond to the foregoing argument. Petitioner in her reply brief maintained that because Respondent "has not refuted or contested that these accusations [of the reasons for Petitioner's termination] were made, that they were inadmissible, or that they prejudiced the jury[,]" Petitioner should be granted a new trial.

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[16] HRE Rule 805 provides that "[h]earsay included within hearsay" is permissible "if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules."

[17] HRE Rule 404(b) provides in pertinent part as follows.

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible where such evidence is probative of another fact that is of consequence to the determination of the action, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, modus operandi, or absence of mistake or accident.

[18] HRE Rule 403 provides that evidence, "[a]lthough relevant," "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

VIII.

The ICA disagreed with Petitioner, determining that cross examination of Owings was proper, whereas cross examination of Ferrante was improper, but did not "clearly prejudice"[19] Petitioner. Steigman, 2010 WL 4621838, at *5. According to the ICA, "[p]ursuant to Rule 702.1(a)[20], a party may generally cross-examine an expert on the matter upon which the expert's opinion is based and the reasons for the expert's opinion, even if the basis for the expert's opinion would ordinarily be inadmissible." Id. Therefore, the ICA reasoned, "pursuant to HRE Rule 702.1(a), [Respondent] could properly cross-examine Owings regarding the content of . . . [the c]hronology, which summarized the documents upon which Owings' expert opinion was largely based." Id.

As to Ferrante's cross examination, the ICA determined that although Respondent's "reference to [Petitioner's] alleged timecard fraud during its cross-examination of Ferrante was improper[,]" Petitioner was not "clearly prejudiced" because (1) the court instructed the jury that counsel's statements and questions are not evidence, (2) Ferrante's testimony was

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[19] "[T]he extent of cross-examination is a matter largely within the discretion of the trial court and will not be the subject of reversal unless clearly prejudicial to the complaining party." Bhakta, 109 Hawaiʻi at 208, 124 P.3d at 953 (internal quotation marks and citation omitted).

[20] HRE 702.1(a) (1993) provides:

> A witness testifying as an expert may be cross-examined to the same extent as any other witness and, in addition, may be cross-examined as to (1) the witness' qualifications, (2) the subject to which the witness' expert testimony relates, and (3) the matter upon which the witness' opinion is based and the reasons for the witness' opinion.

(Emphases added.)

restricted to causation and damages which the jury did not reach in rendering its verdict and Ferrante stated that he continued to believe Petitioner, and (3) "most importantly," the "reference to timecard fraud was repeated through Owing[]s[']] testimony," which was "properly elicited on cross-examination[.]" Id.

IX.

A.

Under HRE Rule 703 (1993), an expert may render "opinions based on data not admissible in evidence so long as 'of a type reasonably relied upon by experts in the particular field.'"[21] Commentary on HRE 703. In that regard, this court has established that an expert may discuss the "bases" for his or her opinion on direct examination to aid the jury in evaluating the expert's opinion.[22] The "bases" may be inadmissible hearsay,[23] so

[21] HRE Rule 703 provides, in its entirety, as follows:

> **Bases of opinion testimony by experts.** The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence. The court may, however, disallow testimony in the form of an opinion or inference if the underlying facts or data indicate lack of trustworthiness.

[22] The basis for the expert's opinion is "not admitted as substantive evidence, but only for purposes of showing the basis of the expert's opinion." Tabieros v. Clark Equip. Co., 85 Hawaiʻi 336, 384, 944 P.2d 1279, 1327 (1997) (internal quotation marks and citation omitted); see Bryan v. John Bean Div. of FMC Corp., 566 F.2d 541, 547 (5th Cir. 1978) (explaining that a court may give "strong limiting instructions to prohibit the jury from considering the [hearsay that formed the facts or data for an expert's opinion] . . . substantively"); see also Keus v. Brooks Drug, Inc., 652 A.2d 475, 478 (Vt. 1994) (noting that disclosure of the underlying facts or data "is admissible only for a limited purpose[,]" of constituting the facts or data underlying the experts opinion, that "may be useful to the jury in evaluating the expert's testimony").

[23] If the "matters" are admitted into evidence, then the expert, of course, can testify to them. An expert who had "based" his "opinions" on "medical records, clinical notes, and operative reports of [doctors], and the

long as the following three requirements are satisfied:

> [A]n expert witness [may] reveal[], in the course of direct examination, the contents of the materials upon which he or she has reasonably relied--hearsay though they may be--in order to explain the basis of his or her opinion, provided, of course, that (1) the expert has actually relied on the material as a basis of the opinion, (2) the materials are "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject," and (3) the materials do not otherwise "indicate lack of trustworthiness."

Tabieros, 85 Hawaiʻi at 384, 944 P.2d at 1327 (emphases added) (quoting HRE Rule 703).[24] In Tabieros, the circuit court prohibited a report from being admitted into evidence but allowed "experts [to] refer to the report in their testimony." Id. at 381, 944 P.2d at 1324. An expert witness read repeatedly from the report, over objection. Id. at 383, 385, 944 P.2d at 1326, 1328. This court held that the expert's testimony did not satisfy the "preconditions to disclosure of the contents of the [report] within the context of explaining[] . . . the bases of his expert opinions[,]" id. at 385, 944 P.2d at 1328 (emphasis

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medical records of [a doctor,]" which were "admitted into evidence during the trial" was permitted to provide opinions about whether a doctor had properly performed a procedure and whether the doctor caused the plaintiff's injuries. Swink v. Cooper, 77 Hawaiʻi 209, 215, 881 P.2d 1277, 1283 (App. 1994) (emphasis added). See Keus, 652 A.2d at 478-79 (noting that only "if the basis material is independently admissible under a hearsay exception may it be used substantively").

[24] Tabieros also noted that HRE Rule 705, quoted below, which allows an expert to give an opinion without disclosing the underlying facts or data, was intended to eliminate the burdensome practice of requiring attorneys to formulate hypothetical questions in the instances where the expert "bases" his opinion upon other than firsthand knowledge. 85 Hawaiʻi at 384, 944 P.2d at 1327. In its entirety, Rule 705 provides as follows:

> **Disclosure of facts or data underlying expert opinion.** The expert may testify in terms of opinion or inference and give the expert's reasons therefor without disclosing the underlying facts or data if the underlying facts or data have been disclosed in discovery proceedings. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

(Emphasis added.)

added), inasmuch as the expert "made no allusion to the [report]" when he listed the "factual bases of his opinions[,]" and he "read repeatedly from the [report] and explicated its data and conclusions without ever indicating in what manner the report's contents formed a basis of his opinions or in what way he otherwise relied on it[,]" id.[25]

Similarly, in State v. Davis, 53 Haw. 582, 588, 499 P.2d 663, 668 (1972), an expert real estate consultant and appraiser testified that land had suffered "damages in the amount of $255,170[,]" a "figure which [the expert] obtained from an engineer who was neither identified nor called upon to testify[.]" Insofar as "[a]n expert witness may not . . . serve as a mere conduit for the hearsay opinion, the factual basis of which is not established through evidence, of another expert who does not testify when the expert who does testify lacks the requisite qualifications to render the opinion in his own right[,]" id. at 589-90, 499 P.2d at 669 (emphasis added), this court held that it was erroneous to permit the expert's testimony as to the amount of damages sustained. Id.

B.

Similar to an expert disclosing on direct examination "the contents of the materials upon which he or she has reasonably relied . . . to explain the basis" of the opinion,

[25] Also, the expert, "[o]n cross-examination, . . . could not . . . recall where he had obtained the [report]," and only "[l]ater in his testimony, when [the plaintiffs'] counsel inquired whether the [report] was one of the bases of his expert opinion, [the expert] answered in the affirmative[.]" Tabieros, 85 Hawaiʻi at 385, 944 P.2d at 1328.

Tabieros, 85 Hawaiʻi at 384, 944 P.2d at 1327, an expert can be cross examined pursuant to HRE Rule 702.1(a) about "the matter upon which the witness' opinion is based and the reasons for the witness' opinion[.]" (Emphases added.) Although the Tabieros requirements regarding otherwise inadmissible matter were established with respect to direct examination, logically, there is no reason to alter the grounds permitting inquiry into the "basis" for an expert's opinion on cross examination. Thus, Tabieros should apply to cross examination of an expert on the basis or bases relied on for his or her opinion. Indeed, the commentary to HRE Rule 702.1 explains that "a broad testimonial range" pursuant to HRE Rule 703 "suggests the need for an equally broad cross-examination" under HRE Rule 702.1(a). (Emphasis added.) This would indicate that the requirements set forth in Tabieros for consideration of otherwise inadmissible facts or data underlying an expert's opinion on direct examination applies "equally" to admission of such matters on cross examination. See also HRE Rule 705 (stating, in part, that "[t]he expert may . . . be required to disclose the underlying facts or data on cross-examination[]").

X.

In the instant case, Owings gave an opinion as to Petitioner's potential employment options and the type of employment she could perform. Arguably, the termination entry was not a "basis" of Owings' opinion that "sedentary employment" was critical and that she should pursue further education.

Consequently, Owings' opinion was not "based" on the termination entry. Similar to Tabieros, Owings was required to "read . . . from the [employment entry]" "without ever indicating in what manner the . . . contents formed a basis of his opinions[.]" 85 Hawaiʻi at 385, 944 P.2d at 1328. Therefore, on cross examination by Respondent, Owings "serve[d] as a mere conduit for the hearsay opinion," Davis, 53 Haw. at 589-90, 499 P.2d at 669, that Petitioner was terminated for timecard fraud, "the factual basis of which [was] not established through evidence[,]" id.

The circumstances here are also similar to those in Keus, 652 A.2d at 477. In that case, the plaintiff was given the wrong medication by a pharmacist and was injured when she fell in her shower. She subsequently sued the pharmacist and the drug store. At trial, the expert testified that he believed the plaintiff's accident was caused by the drug she had mistakenly been given and that her fall would have occurred even if she had not been in the shower. Id. In response to a question by the plaintiff's counsel on direct examination, the expert stated that he had based part of his history of the plaintiff's injury on the reports made by two other doctors. Id. On cross-examination, the trial court admitted the reports of the other doctors over the objection of the plaintiff's counsel. Id. at 477-78.

On appeal, the Supreme Court of Vermont concluded that the trial court erred in admitting the reports on cross-examination. Id. at 480. The court explained that the opinions and conclusions in the two doctors' reports were inadmissible under Vermont Rule of Evidence 705 (substantially similar to HRE

Rule 705)[26] because the expert did not rely on them in his own opinion. Id. at 479. Instead, "he used the reports only for the purpose of obtaining a history of the injury." Id. As in Keus, it was error for Owings to be cross examined about the termination entry, under HRE Rule 702.1(a), inasmuch as it was not established that the entry was "matter upon which the witness' opinion [was] based[.]" HRE Rule 702.1(a).

XI.

Moreover, facts or data relied upon by an expert are not admissible unless they are of "a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject," HRE Rule 703, Tabieros, 85 Hawaiʻi at 384, 944 P.2d at 1327; see United States v. Locascio, 6 F.3d 924, 938 (2d Cir. 1993) ("[E]xpert witnesses can testify to opinions based on hearsay or other inadmissible evidence if experts in the field reasonably rely on such evidence in forming their opinions."); see also United States v. Beasley, 72 F.3d 1518, 1528 (11th Cir. 1996) ("Expert medical testimony concerning the truthfulness or credibility of a witness is generally inadmissible because it invades the jury's province to make credibility determinations."). "Indeed, the very purpose of the reasonable reliance requirement is to set a standard for validating, as an expert's basis, material that will not achieve

[26] Vermont Rule of Evidence 705 provides:

> The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

admissibility under [the HRE]." Addison M. Bowman, Hawaiʻi Rules of Evidence Manual § 703-2[2], at 7-32 (3d ed. 2006). "In determining whether an expert's reliance on information is reasonable, a trial court must evaluate the opinion and its foundation on a case-by-case basis." Lai v. St. Peter, 10 Haw. App. 298, 314, 869 P.2d 1352, 1361 (1994), overruled on other grounds by Richardson v. Sport Shinko, 76 Hawaiʻi 494, 880 P.2d 169 (1994)).

In the instant case, there is no indication that the entry relied upon by Owings was of a type "reasonably relied" upon by experts in Owings' field, nor did the court "evaluate" Owings' opinion and its "foundation" before overruling Petitioner's objection to the entry. Consequently, it was error for the entry to be admitted during cross examination, inasmuch as there was no evidence that the entry was of a type reasonably relied upon by experts in Owings' field.[27]

XII.

Finally, recitation of the entry should have been disallowed inasmuch as there were indications of "lack of trustworthiness[.]" HRE Rule 703; Tabieros, 85 Hawaiʻi at 384, 944 P.2d at 1327. "The possibility of exclusion of the [untrustworthy] opinion arises whenever an element of the expert's basis fails to achieve even the minimum evidentiary

[27] There is also no indication that the jury was directed to consider the entry for the limited purpose of examining Owings' testimony, and not as substantive evidence. See Tabieros, 85 Hawaiʻi at 384, 944 P.2d at1327 ("Once disclosed, the facts or data are not admitted as substantive evidence, but only for purposes of showing the basis of the expert's opinion." (Internal quotation marks and citation omitted)).

respectability of the reasonable reliance standard." Bowman, supra, § 703-2[4], at 7-35. In Tabieros, because the report at issue was, inter alia, "based on multiple hearsay, [and] was of undetermined authorship," the report indicated a lack of trustworthiness and the expert should not have been allowed to read repeatedly from the report. 85 Hawaiʻi at 387, 944 P.2d at 1330.

Bryan v. John Bean Div. of FMC Corp. is also instructive. In Bryan, the plaintiff sustained back and eye injuries after a clevis (cast-iron tool) he was using broke. 566 F.2d at 543. The plaintiff sued the designer-distributor of the clevis. Id. At trial, Walters, an expert witness, testified that the clevis was strong enough to endure the stress of normal use. Id. at 544. Walters based this conclusion on data provided in the reports by two other experts who did not testify at trial. Id. During Walters' cross-examination, plaintiff's counsel paraphrased and directly quoted opinions contained in the other reports. Id. The defendants objected, arguing that the facts in the reports were admissible, but the experts' opinions were not. Id. The court disagreed and admitted the opinions. Id.

On appeal, the Fifth Circuit concluded that the trial court erred in admitting the experts' opinions. Id. That court stated that under Rule 705 of the Federal Rules of Evidence (substantially similar to HRE Rule 705),[28] "otherwise hearsay

[28] At the time of the decision, Rule 705 of the Federal Rules of Evidence stated:

> The expert may testify in terms of opinion or inference and give his reasons therefor without prior

evidence that reveals the underlying sources of the expert's opinion should be as permissible on cross-examination as on direct[,]" but that "[l]ike all exceptions to the hearsay rule the full disclosure of the source underlying a testifying expert's opinion depends upon the two critical factors of necessity and trustworthiness[,]" id. at 545. The Fifth Circuit concluded that parts of the opinions should not have been admitted because they were unnecessary and the opinions did not bear certain indicia of trustworthiness. Id.

As in Bryan and Tabieros, there appears to be no dispute in this case that the employment entry contained hearsay, and even multiple hearsay. The entry and testimony thereon would have been admissible as substantive evidence only under an exception to the hearsay rule.[29] But no hearsay exception was proffered to the court that would allow the entry, or testimony

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> disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

Keus, 652 A.2d at 545 n.4.

The rule has since been amended in non-relevant part to provide as follows:

> The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

[29] In regard to trustworthiness, Bryan stated:

> [w]hen courts have permitted disclosure of hearsay underlying an expert's opinion[,] . . . some external circumstances guaranteed the reliability of the evidence. Sometimes the evidence can be relied upon because it constitutes a routine and customary record of a business concern . . . or because an uninterested, expert third part prepared the report . . . or because experts particularly doctors customarily rely upon third party reports from other experts.

566 F.2d at 546.

concerning it, into evidence. Here, the preparer of the chronology, the writer of the entry itself, and the person(s) making the statements recorded in the entry, were not called to testify. No foundation was laid for admission of the entry as a record kept in the ordinary course of business, or as a public record. Although Respondent stated that it would call witnesses from the company to establish a foundation for admission of the entry, it never did. Thus, the entry lacked "even . . . minimum evidentiary respectability." Bowman, supra, § 703-2[4], at 7-35. It was therefore error for the court to allow Owings to discuss the entry inasmuch as "inadmissible material" placed "before the jury" the "authoritative conclusion[]" of Petitioner's employer regarding the reasons Petitioner was terminated, which were not "otherwise admissible." See Tabieros, 85 Hawaiʻi at 386-87, 944 P.2d at 1329-30 (concluding that expert testimony that disclosed otherwise inadmissible material for the purpose of either "injecting untrustworthy evidence into the trial" or "indirectly placing before the jury the purportedly authoritative conclusions of others on the same subject--not otherwise admissible on some independent ground--is improper.")

Additionally, a trial court should "exercise supervision over the expert's testimony, pursuant to HRE . . . 403, to ensure that the testimony is not prejudicial." Id. at 394, 944 P.2d at 1337. Thus, "expert testimony otherwise admissible under [Federal Rules of Evidence (FRE)] Rules 702 and

703[30] may[, pursuant to FRE Rule 403,[31]] still be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury[.]" City of Chicago v. Anthony, 554 N.E.2d 1381 (Ill. 1990) (internal quotation marks and citations omitted).

XIII.

Based on the foregoing, the ICA reversibly erred in upholding the court's admission of the entry, insofar as (1) there was no evidence as to whether Owings' opinion was "based" on the entry containing the information; (2) there was no indication that the entry read was of a type "reasonably relied" on by experts in the field of vocational rehabilitation; and (3) there was no discussion of whether the entry was "trustworth[y,]" necessary prerequisites to a determination of whether inadmissible evidence may be elicited through an expert for the purpose of explaining the basis or bases of the expert's opinion, see HRE Rule 703; see also HRE Rule 702.1(a). Owings

[30] It is notable that Rule 703 of the FRE was amended in 2000 to require that "[f]acts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect." The commentary explained, "Rule 703 has been amended to emphasize that when an expert reasonably relies on inadmissible information to form an opinion or inference, the underlying information is not admissible simply because the opinion or inference is admitted." 2000 FRE Rule 703 Commentary (emphasis added). According to the federal rule, "[t]he information may be disclosed to the jury, upon objection, only if the trial court finds that the probative value of the information in assisting the jury to evaluate the expert's opinion substantially outweighs its prejudicial effect." Id. (emphasis added).

[31] Rule 403 of the FRE, which is identical to HRE Rule 403, provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

should not have been allowed to read the entry into the record under the guise of an inquiry into the basis for his opinion. See HRE Rule 703; see also HRE Rule 702.1(a); HRE Rule 705. Therefore, on remand, assuming an objection is raised, the court must ascertain whether on cross examination, as on direct examination, an expert's opinion is "based" on certain facts, data, or matter that are "reasonably relied" on by other experts in the field, and that does not indicate lack of trustworthiness.

XIV.

In light of the fact the cross examination of Owings was erroneous, the ICA was incorrect in deciding that the question posed to Ferrante, of whether Petitioner's termination for timecard fraud would indicate a credibility problem, was not clearly prejudicial. First, as to the ICA's "most important[]" reason, that the reference to timecard fraud was "properly elicited" during Owings' cross examination, the reference was not "properly elicited" for the reasons discussed supra, and, thus, cannot support the conclusion that Petitioner was not prejudiced. Steigman, 2010 WL 4621838, at *5. Second, the jury instruction that counsel's statements and questions are not evidence, in fact had a deleterious effect inasmuch as the jury was also instructed that attorneys' remarks "may assist [the jury] in understanding the evidence and applying the law[.]" Thus, the jury was directed to Respondent's use of the hearsay remarks as of assistance in "understanding the evidence" and applying the law. Third, although Ferrante's testimony concerned causation and damages, the assertion that the jury did not "reach" those

questions, Steigman, 2010 WL 4621838, at *5, is speculative inasmuch as the jury is obligated to consider all of the evidence and testimony in reaching a decision, and therefore the jury is presumed to have considered Ferrante's testimony. See Hawaiʻi Civil jury Instruction No. 3.3 ("Upon consideration of all the evidence, if [the jury] find[s] that a particular claim[] . . . is more likely true than not true, then such claim, defense, or fact has been proven by a preponderance of the evidence."). Moreover, the fact that the jury delivered a verdict that Respondent was not negligent does not dispel the inference that the question to Ferrante suggesting that Petitioner had lied before and was lying now, could have influenced the jury into returning a verdict against Petitioner.

XV.

For the reasons discussed herein, I concur that the case must be remanded to the court for a new trial, but on the grounds stated herein.

DATED: Honolulu, Hawaiʻi, December 14, 2011.

/s/ Simeon R. Acoba, Jr.

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